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(LM-7634)

CV 97 7521

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

- against -

THE NEW YORK CITY TRANSIT
AUTHORITY,

Defendant.

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COMPLAINT

Civil Action
No.

GLASSER, J.
POLAK, M.
U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Plaintiff, the UNITED STATES OF AMERICA, by its attorney ZACHARY W. CARTER, United States Attorney for the Eastern District of New York, Linda M. Marino, Assistant U.S. Attorney, of counsel, by the authority of the Attorney General and on behalf of the United States Environmental Protection Agency ("EPA"), for its complaint against defendant herein alleges as follows:

NATURE OF THE ACTION

1. This is a civil action for injunctive relief and civil penalties pursuant to § 113 of the Clean Air Act ("the Act"), 42 U.S.C. § 7413, for violations of § 112 of the Act, 42 U.S.C. §§ 7412, and the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for asbestos, 40 C.F.R. Part 61, Subpart M. This action is based on violations which occurred in connection with renovation activities at six different subway

(A)

stations owned by the defendant the New York City Transit Authority (the "TA") in Brooklyn and Queens, New York.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, 1355 and § 113(b) of the Act, 42 U.S.C. § 7413(b). Notice of commencement of this action has been provided to the State of New York as required by 42 U.S.C. § 7413(b).

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c) and § 113(b) of the Act, 42 U.S.C. § 7413(b), because defendant's principal place of business is located within the Eastern District of New York and the violations alleged herein occurred in the Eastern District of New York.

THE DEFENDANT

4. The defendant TA is a public corporation, which owns and operates an extensive subway system, consisting of subway lines and stations that provide mass transportation to the public in New York City. Its principal place of business is 370 Jay Street, Brooklyn, New York 11201.

5. The TA is responsible for the custody, control, repair and improvement of the subway stations that it owns. The violations at issue occurred at six different subway stations owned by the TA.

STATUTORY AND REGULATORY BACKGROUND

6. Section 112(b)(1) of the Act, 42 U.S.C. § 7412(b)(1), sets forth a list of hazardous air pollutants. Section 112(b)(2) of the Act requires the Administrator of the EPA (the "Administrator") to periodically review and revise the list set forth in § 112(b)(1) and, where appropriate, add pollutants which present or may present a threat of adverse human health or environmental effects.
7. Asbestos is listed in § 112(b)(1) of the Act as a hazardous pollutant, 42 U.S.C. § 7412(b)(1), having been so designated by the Administrator pursuant to § 112(b)(2), 42 U.S.C. § 7412(b)(2). See 36 Fed. Reg. 5931 (1971).
8. Section 112(d)(1) of the Act, 42 U.S.C. § 7412(d)(1), directs EPA to adopt regulations establishing standards for the emission of hazardous air pollutants listed in § 112(b) of the Act. These emission standards are known as the National Emission Standards for Hazardous Air Pollutants ("NESHAP").
9. To the extent that it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant, § 112(h) of the Act, 42 U.S.C. § 7412(h), authorizes the Administrator to promulgate "design, equipment, work practice, or operational" standards, which are to be treated as emission standards.
10. In 1973, the Administrator promulgated the NESHAP for asbestos, which were codified at 40 C.F.R. Part 61, Subpart

B, §§ 61.20 to 61.25 (the "Asbestos NESHAP"). The Asbestos NESHAP include regulations relating to emission levels, handling, and disposal of asbestos. On April 5, 1984, the EPA published amendments to and repromulgated portions of the Asbestos NESHAP. The amended Asbestos NESHAP regulations were recodified at 40 C.F.R. Part 61, Subpart M, §§ 61.140 to 61.156 (49 Fed. Reg. 13658-665 (April 5, 1984)). The version of the Asbestos NESHAP presently in effect under § 112 of the Act was adopted by the EPA on November 20, 1990. 55 Fed. Reg. 48406-433 (November 20, 1990).

11. The Asbestos NESHAP define "asbestos" as "the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite and actinolite-tremolite." 40 C.F.R. § 61.141.

12. The Asbestos NESHAP require each owner or operator of a renovation activity to comply with certain work practice procedures set forth in the Asbestos NESHAP for emission control where the amount of regulated asbestos-containing material ("RACM") to be stripped or removed at a facility is at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on boilers or structural components. 40 C.F.R. § 61.145.

13. "Owner or operator of a renovation activity" is defined in the Asbestos NESHAP as any person who owns, leases, operates, controls or supervises the facility being renovated or

any person who owns, leases, operates, controls or supervises the renovation operation. 40 C.F.R. § 61.141.

14. "Renovation" is defined as "altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component." 40 C.F.R. § 61.141.

15. "RACM" is defined as friable asbestos material or nonfriable asbestos-containing material that has become friable, that will be or has been subjected to sanding, grinding, cutting or abrading, or has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of renovation operations. 40 C.F.R. § 61.141.

16. "Friable asbestos material" is defined as any material that contains more than one percent asbestos and can be crumbled, pulverized, or reduced to powder by hand pressure when dry. 40 C.F.R. § 61.141.

17. Section 113(b) of the Act, 42 U.S.C. § 7413(b), authorizes the Administrator to "commence a civil action for a permanent or temporary injunction" and for recovery of a "civil penalty of not more than \$25,000 per day for each violation" against any person who violates any requirement or prohibition under Subchapter I of the Clean Air Act, including § 112 of the Act, and any rule promulgated, issued or approved thereunder.

18. Pursuant to § 302(e) of the Act, 42 U.S.C. § 7602(e), the term "person" includes, among other entities, an individual, corporation, partnership, association, State and municipality.

THE TA'S STATUS UNDER THE
CLEAN AIR ACT AND NESHAP REGULATIONS

19. At all times relevant to this complaint, the TA was a person within the meaning of § 302(e) of the Act, 42 U.S.C. § 7602(e).

20. At all times relevant to this complaint, the TA, as owner of the six subway stations referred to in ¶ 23, below, was an "owner or operator" within the meaning of § 113(b) of the Act, 42 U.S.C. § 7413(b), 40 C.F.R. § 61.02, and was an "owner or operator of a renovation activity" within the meaning of the Asbestos NESHAP, 40 C.F.R. § 61.141.

THE SUBWAY RENOVATIONS

21. During the period from November 1992 through May 1993, the TA renovated certain subway platforms on the Myrtle Avenue and Brighton Beach subway lines owned by the TA (the "subway renovations").

22. As part of the subway renovations, more than 160 square feet of RACM was removed from the roofs of elevated subway platforms at each of the six subway stations in Brooklyn and Queens, New York.

23. The subway stations from which RACM was removed are the Seneca Avenue and Forest Avenue stations on the Myrtle Avenue subway line in Queens, New York, the Knickerbocker Avenue

and Central Avenue stations on the Myrtle Avenue subway line in Brooklyn, New York, and the Ocean Parkway and Brighton Beach stations on the Brighton Beach subway line in Brooklyn, New York.

24. The subway renovations were "renovations" as defined in the Asbestos NESHAP, 40 C.F.R. § 61.141.

25. The RACM was removed from each of the six subway stations in complete disregard of the requirements of the Asbestos NESHAP. In violation of the Asbestos NESHAP, the RACM was: (a) broken off the underlying roof support structure with hammers and chisels, instead of carefully cut off; (b) broken into pieces by being bent and hit with hammers; (c) not wetted or inadequately wetted while it was stripped from the roofs of the subway platforms or after it was stripped from the roofs to prevent the emission of asbestos fibers into the air; (d) dropped from the roofs to the elevated platforms below, causing it to break and scatter; and (e) not deposited as soon as practical at a proper waste disposal site.

26. The improper practices used in removing the RACM from the six subway stations resulted in the emission into the air of large quantities of asbestos-containing dust and the deposit of RACM all over the neighborhoods surrounding the subway stations.

FIRST CLAIM FOR RELIEF

27. Plaintiff repeats and realleges the allegations of paragraphs 1 through 26 of the complaint as if fully set forth herein.

28. For each of the renovation operations referred to in ¶¶ 21-23, the RACM was not adequately wetted while it was stripped from the roofs of the subway platforms to prevent the emission of asbestos fibers into the air, as required by 40 C.F.R. § 61.145(c)(3).

29. By reason of the foregoing, with respect to each of the subway renovations referred to in ¶¶ 21-23, the TA violated the Asbestos NESHAP, 40 C.F.R. § 61.145(c)(3), and § 112(c) of the Act, 42 U.S.C. § 7412(c), and is liable to the United States for civil penalties under § 113(b) of the Act, 42 U.S.C. § 7413(b).

30. Upon information and belief, the TA will continue to violate the Asbestos NESHAP and the Act, unless enjoined by the order of this Court.

SECOND CLAIM FOR RELIEF

31. Plaintiff repeats and realleges the allegations of paragraphs 1 through 26 of the complaint as if fully set forth herein.

32. For each of the renovation activities referred to in ¶¶ 21-23, the RACM was not adequately wet after being stripped from the roofs of the subway platforms and was not kept wet until collected and contained or treated in preparation for disposal, as required by 40 C.F.R. § 61.145(c)(6)(i).

33. By reason of the foregoing, with respect to each of the subway renovations referred to in ¶¶ 21-23, the TA violated the Asbestos NESHAP, 40 C.F.R. § 61.145(c)(6)(i), and

§ 112(c) of the Act, 42 U.S.C. § 7412(c), and is liable to the United States for civil penalties under § 113(b) of the Act, 42 U.S.C. § 7413(b).

34. Upon information and belief, the TA will continue to violate the Asbestos NESHAP and the Act, unless enjoined by the order of this Court.

THIRD CLAIM FOR RELIEF

35. Plaintiff repeats and realleges the allegations of paragraphs 1 through 26 of the complaint as if fully set forth herein.

36. For each of the renovation activities referred to in ¶¶ 21-23, the RACM was thrown, dropped or otherwise carelessly lowered to the ground, causing the RACM to be damaged and disturbed.

37. By reason of the foregoing, with respect to each of the subway renovations referred to in ¶¶ 21-23, the TA violated the Asbestos NESHAP, 40 C.F.R. § 61.145(c)(6)(ii), and § 112(c) of the Act, 42 U.S.C. § 7412(c), and is liable to the United States for civil penalties under § 113(b) of the Act, 42 U.S.C. § 7413(b).

38. Upon information and belief, the TA will continue to violate the Asbestos NESHAP and the Act, unless enjoined by the order of this Court.

FOURTH CLAIM FOR RELIEF

39. Plaintiff repeats and realleges the allegations of paragraphs 1 through 26 of the complaint as if fully set forth herein.

40. For each of the renovation operations referred to in ¶¶ 21-23, visible emissions of asbestos-contaminated dust were discharged to the outside air during the collection, processing, packaging and/or transporting of the RACM.

41. By reason of the foregoing, with respect to each of the subway renovations referred to in ¶¶ 21-23, the TA violated the Asbestos NESHAP, 40 C.F.R. § 61.150(a), and § 112(c) of the Act, 42 U.S.C. § 7412(c), and is liable to the United States for civil penalties under § 113(b) of the Act, 42 U.S.C. § 7413(b).

42. Upon information and belief, the TA will continue to violate the Asbestos NESHAP and the Act, unless enjoined by the order of this Court.

FIFTH CLAIM FOR RELIEF

43. Plaintiff repeats and realleges the allegations of paragraphs 1 through 26 of the complaint as if fully set forth herein.

44. For each of the subway renovations referred to in ¶¶ 21-23, the RACM was not deposited as soon as practical at a waste disposal site, as required by 40 C.F.R. § 61.150(b).

45. By reason of the foregoing, with respect to each of the subway renovations referred to in ¶¶ 21-23, the TA

violated the Asbestos NESHAP, 40 C.F.R. § 61.150(b), and § 112(c) of the Act, 42 U.S.C. § 7412(c), and is liable to the United States for civil penalties under § 113(b) of the Act, 42 U.S.C. § 7413(b).

46. Upon information and belief, the TA will continue to violate the Asbestos NESHAP and the Act, unless enjoined by the order of this Court.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Court:

47. enter judgment against the defendant, assessing a civil penalty of \$25,000 per day of violation for each violation of the Clean Air Act and the Asbestos NESHAP;

48. enjoin defendant to comply with the Clean Air Act and the Asbestos NESHAP;

49. award plaintiff its costs and disbursements in this action;

50. award such other and further relief as this Court deems appropriate.

Dated: Washington, D.C.

Aug. 27, 1997

Respectfully submitted,

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Dated: Brooklyn, New York

Dec. 23, 1997

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